IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. [redacted] 19

UNIVERSAL INTERPRETIVE SHUTTLE CORPORATION,
Petitioner,

v.

WASHINGTON METROPOLITAN AREA TRANSIT COMMISSION, ET AL., *Respondents.*

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR PETITIONER

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BRIEF FOR PETITIONER

OPINIONS BELOW

The unreported opinion of the District Court is set forth in the Appendix (App. 97). The Court of Appeals filed no opinion other than that contained in its order which is unreported (App. 113).

JURISDICTION

The order of the Court of Appeals was entered on June 13, 1967. A petition for rehearing *en banc* was denied on October 3, 1967. The petition for a writ of certiorari was filed on December 31, 1967 and granted on March 4, 1968. The jurisdiction of this Court rests on 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Did Congress, in approving the interstate compact creating the Washington Metropolitan Area Transit Commission, intend to take away from the executive branch of the United States Government, its exclusive control of the central Mall area of the District of Columbia and to give the Washington Metropolitan Area Transit Commission the power to prevent the United States from conducting, through a private concessioner, a service which provides a narrative description of points of interest within the central Mall area while carrying visitors within the area in trams?

2. Is a mobile service provided by a concessioner of the United States within the central Mall area for the purpose of providing visitors a narrative description concerning points of national interest, "transportation for hire" within the meaning of the interstate compact creating the Washington Metropolitan Area Transit Commission?

3. Does the Washington Metropolitan Area Transit Commission whose jurisdiction is limited to the regulation of persons providing "transportation for hire . . . between any points in the Metropolitan District" have

regulatory jurisdiction over a mobile interpretive service conducted within the central Mall area which service originates and terminates at the same point, with no passengers embarking or debarking en route?

4. Is a mobile interpretive service utilizing vehicles bearing the National Park Service emblem and operated by a concessioner on federally owned and managed park lands under a contract with the Federal Government which provides for the control of every detail of operation by the Secretary of the Interior and for a division of gross proceeds between the concessioner and the Government, transportation "by the Federal Government" within the meaning of the interstate compact creating the Washington Metropolitan Area Transit Commission?

5. In the Congressionally enacted franchise of a common carrier, D. C. Transit System, Inc., which prohibits the operation of a competitive bus or railway line transporting passengers over a given route on a fixed schedule without a certificate being issued by a local regulatory agency, violated by the operation without a certificate of a mobile interpretive service within the central Mall area when the Secretary of the Interior retains the right from time-to-time to change rates, routes and schedules of the service?

6. Do the respondents who now operate private sightseeing tours on the Mall at the sufferance of the Secretary of the Interior have standing or any substantive right to seek an injunction prohibiting the operation of the service proposed by the Secretary?

STATUTES INVOLVED

The principal statutory provisions involved are as follows:

16 U.S.C. §§ 1, 1c, 2, 3, 17b, 20, 20a-g; D. C. Code §§ 8-108, 8-135, 8-144; The Washington Metropolitan Area Transit Regulation Compact as approved by Act of September 15, 1960, 74 Stat. 1031, D. C. Code §§ 1-1410 to 1-1412; Act of July 24, 1956, 70 Stat. 598. Relevant portions of the aforementioned statutes and Compact are printed in Appendix A of this brief.

STATEMENT OF THE CASE

On March 24, 1967 Universal Interpretive Shuttle Corporation (Universal) executed a Contract (the Contract), which is reproduced at App. 67-87, with the United States of America for the operation by Universal of an interpretive shuttle service in the central Mall area of Washington, D. C. as a concessioner of the United States. Upon the expiration of a 60-day waiting period in which the Contract was submitted to Congress the Contract was executed by the United States acting in this behalf by the Secretary of the Interior (Secretary) through the Director of the National Park Service (Director) and became a mutually binding agreement.[1]

1. The Proceedings Below

The Washington Metropolitan Area Transit Commission (WMATC), an agency created by an interstate compact between the states of Maryland and Virginia and the District of Columbia, with the consent of Con-

[1] The United States and Universal also entered into an interim agreement dated March 24, 1967 in order to permit the initiation of the interpretive service during the Spring of 1967; the interim agreement stated that it would expire no later than June 30, 1967.

gress, Act of September 15, 1960, 74 Stat. 1031, D. C. Code § 1-1410, commenced this action on March 31, 1967 in the United States District Court for the District of Columbia to enjoin Universal from operating under the Contract.

D. C. Transit System, Inc. (D. C. Transit), Washington Sightseeing Tours, Inc., Blue Lines, Inc., and White House Sightseeing Corporation, each of which holds a certificate from WMATC to operate charter and sightseeing services (D. C. Transit also holds a certificate to perform regular route service) intervened as parties plaintiff. The United States filed a representation of interest in support of Universal's position and participated in all the proceedings in the District Court.

The District Court dismissed the complaint and filed a written opinion which is unreported (App. 97-112). All of the plaintiffs thereafter appealed to the United States Court of Appeals for the District of Columbia.

The United States as *amicus curiae* and Universal sought affirmance in the Court of Appeals of the District Court's judgment, but a three-judge panel of the Court of Appeals (one judge dissenting) in an unreported order (App. 113) reversed the order of the District Court. Universal petitioned the Court of Appeals for an *en banc* rehearing and the United States filed an *amicus curiae* brief in support of Universal's petition. On October 3, 1967, the petition was denied (two judges dissenting) (App. 114). Universal then filed a petition for a writ of certiorari in this Court and the United States as *amicus curiae* filed a memorandum in support of Universal's petition. The petition was granted by this Court on March 4, 1968 (App. 116).

2. Federal Actions Concerning the Mall

The central Mall area is included within the National Park System and as such is specifically committed to the "exclusive charge and control" of the Director of the National Park Service, a subordinate of the Secretary of the Interior, by the Act of July 1, 1898, 30 Stat. 570, as amended, D. C. Code § 8-108. It is bounded on the north by the White House, on the east by the Grant Memorial, on the south by the Jefferson Memorial, and on the west by the Lincoln Memorial (App. 88). The central Mall, which contains and is flanked by some of the foremost national shrines and many points of historic, educational, aesthetic and patriotic importance, is a focal point of interest in the Federal City.

Estimates relied upon by the Secretary are that more than 12 million persons visited the central Mall area in 1965 (App. 68, 98) and the Director of the National Park Service believes that this number will substantially increase in the near future (App. 68). According to the Director, the present parking and traffic circulation facilities within the central Mall area are already taxed to the maximum, and "with two or three times the number of people expected in the years ahead, the situation will become intolerable if permitted to continue" (App. 90).

In order to alleviate vehicular congestion within the Mall and to enhance the aesthetic qualities of the Mall, the Park Service has developed a long-range master plan which has been approved in concept by the National Capital Planning Commission. The plan contemplates placing parking areas and bisecting streets underground and converting the central Mall into a

vast open area reserved for pedestrians. An integral part of the plan calls for the elimination of all vehicular traffic within the Mall other than trackless trains (trams) of the type specified by the Contract (App. 90).

The Director also has long been concerned with an ever increasing need to provide visitors with a well organized, accurate, interesting, and intelligible information program concerning the many national shrines and points of interest in the Mall area (App. 38). The Director stated that:

> "The number of people available to answer questions, giving an explanation of the relationship of the Mall to the L'Enfant and McMillan plans, the history of the Smithsonian Institution, the White House, the Capitol, the memorial structures and other information required to afford the visitor a meaningful experience, is insufficient to meet visitor needs" (App. 90-91).

Furthermore, due to the limited capacity for accommodating visitors within the various shrines and points of interest, the Director has concluded that, ". . . there is a great need now to do interpretation outside of the memorials themselves and the only place that this likely can be done, in our view, is on the Mall in the vicinity of these great memorials" (App. 90).

In order to meet these problems, the Director commissioned a survey by a private consultant. As a result of this survey and other studies previously made for the Mall Master Plan, the Director stated that:

> ". . . I determined that new and increased interpretive services were an essential ingredient needed for proper management. Ideas were sought

> which might be utilized in solving one or more of the administrative problems presented, and when the interpretive tour was brought to my attention I decided that it provided an excellent method by which several problem situations could be alleviated, while at the same time providing a maximum beneficial result to visitors." (App. 91).

In order to test this view, in the Fall of 1966 the Park Service instituted a six-week trial of an interpretive service in the central Mall area, using open-air vehicles. The Director determined that the trial demonstrated "overwhelming approval of the interpretive concept" (App. 91). The Director then concluded that, "proper park management requires this interpretive service, and this has been determined by us to be necessary in the discharge of our statutory duties" (App. 92).

The Director decided that visitor interpretive services could best be performed by a private concessioner (App. 68), and acting pursuant to the authority contained in 16 U.S.C. §§ 1-3, 17b, 20, 20a-g, and in D. C. Code § 8-108, the Park Service issued a prospectus inviting proposals from private firms to enter into a contract to provide such services. The Director testified that:

> ". . . the prime quality that we were looking for was an end product of the kind of service we were seeking, which is a service different from that which is now being provided. We want a service like the one we experimented with in the fall of 1966. We weren't seeking any particular company and, certainly, no preconceived notion as to what type of equipment and this kind of thing; what we were after was an end product of an interpretive service" (App. 43).

In addition to Universal, intervenors D. C. Transit, White House Tours, and Washington Sightseeing Tours, Inc. were among the seven firms who responded to the prospectus by submitting proposals. Universal was awarded the Contract by the Secretary. In commenting upon the award, the Director said: "The thing [Universal] stressed most and what impressed me most in their proposal was their interpretive qualifications" (App. 44).

Prior to entering into the formal agreement Universal was informed by the Department of the Interior that the Secretary had exclusive charge and control over the central Mall area, and that the interpretive service required by the Contract would be subject only to the requirements imposed by the United States of America.

3. The Contract Between the United States and Petitioner

Universal signed the Contract on March 24, 1967. In the Contract the Secretary authorized the concessioner Universal:

> ". . . to establish, maintain, and operate a Visitor Interpretive Shuttle Service for the public within the Mall area of the city of Washington, National Capital Region, National Park Service, which service may include visitor interpretive service originating and terminating at the same point, with no passengers embarking or debarking en route, and such other types of service as may be approved by the Secretary, along such routes as may be approved by the Secretary, on a year-round basis (except Christmas Day), under applicable laws, rules, and regulations of the Federal Government, and to use in connection therewith such Govern-

ment-owned lands and improvements as may be designated by the Secretary" (App. 71).

The Contract requires Universal to station guides at eleven designated points of national interest along the Mall. Such guides are required to wear uniforms approved by the Park Service and to be thoroughly conversant with the geography and history of the nation's capital. The stationary guides will be prepared to furnish information about the city and its facilities to all persons regardless of whether they have paid for the visitor interpretive shuttle service (App. 11).

Universal is required by the Contract to operate a mobile interpretive service utilizing trams of a design approved by the Secretary. Each tram is to be manned by a tour guide and by a driver. Each tram will bear the insignia of the National Park Service. As the tram proceeds through the Mall, the guides present a narration to the visitors. The Contract states that the interpretive function is a prime consideration thereunder (App. 75).

The exact route or routes to be followed through the Mall by the mobile visitor interpretive shuttle have not as yet been fixed by the Secretary (App. 49). However, the Director testified that the service will be carried entirely on land owned by the United States in the National Park area (App. 39). If the route finally designated should coincide substantially with the route followed during the Secretary's experiment in the Fall of 1966, the interpretive trams may cross some streets administered by the District of Columbia such as 14th Street, 7th Street and 4th Street which bisect the Mall (App. 45). It is also possible that, during temporary construction of the Inner Loop in the vicinity of the Grant Memorial, the interpretive trams may proceed

briefly along 2nd Street, which is administered by the District of Columbia (App. 46).[2]

It is expected that two basic types of interpretive service will be provided. First, Universal must furnish a "round trip" interpretive tour originating and terminating at the same point with no passengers embarking en route (App. 69). Second, the Contract contemplates that Universal may, with the approval of the Secretary, provide an interpretive shuttle service whereby passengers can commence the narrated tour, proceed to a given point of interest, debark, remain at that point of interest and later join another tram at that point and continue the narrated tour.

The Contract provides for close and continuous regulation by the Secretary of every phase of the activities of Universal; for example, the Secretary controls both the type and number of mobile units to be utilized, rates, routes, hours of service, schedule of trips, and content of narration. The Secretary has assigned government lands and government improvements to be utilized by Universal in connection with operations. Universal agrees to pay a fee to the United States based on Universal's gross receipts from the interpretive service. The Secretary prescribes the manner in which the accounting records of Universal shall be maintained; both the Secretary and the Comptroller General of the United States have the right to examine Universal's books. The Contract requires that Universal carry casualty and liability policies and that the United

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[2] The Director of the National Park Service has authority to arrange for access along such streets by reason of D. C. Code § 8-135, by arranging a transfer of jurisdiction through a simple exchange of letters between the Director of the National Park Service and the Commissioners of the District of Columbia. Such arrangements are now being made (App. 46).

States of America be named as co-insured in liability policies. The United States is given a first lien on all assets of Universal utilized in the visitors' interpretive service.

4. Present Activity Through the Mall

D. C. Transit now operates some fixed route mass transit through the Mall with the specific permission of the Secretary. (Government & Deft. Ex. 1, 2, Tr. 113). D. C. Transit and other intervening sightseeing companies, as well as others similarly situated, are now operating chartered sightseeing services through the Mall at the sufferance of the Secretary (App. 42, 47). The regulations of the Park Service prohibit commercial solicitation in National Capital Parks areas (App. 48). The Director testified that the Park Service does not plan in the immediate future to interfere with existing sightseeing bus operations that go through the Mall (App. 42), and indeed the Park Service plans to increase surface parking spaces available for sightseeing buses on the central Mall after the interpretive service is in operation (App. 49. At such time as vehicular traffic eliminated from the central Mall, pursuant to the Secretary's long-range plans, the Park Service intends to provide ample underground parking for buses operated by charter sightseeing companies (App. 40, 42, 49).

5. Commencement of the Litigation

Almost immediately after the Department of the Interior announced the award of a contract to Universal, WMATC notified Universal of its contention that Universal could not lawfully operate under the Contract unless and until Universal obtained a certificate of convenience and necessity from WMATC. When Universal responded that, on the basis of the advice given

to it by the Department of the Interior, it would not apply for such a certificate, WMATC commenced this action in the District Court. During the pendency of this action, Universal has not operated under the Contract. Each of the intervening plaintiffs joined in WMATC's contention that Universal cannot lawfully operate under the Contract without obtaining a certificate of convenience and necessity from WMATC and, in addition, D. C. Transit urged that Section 3 of the Franchise Act of July 24, 1956, 70 Stat. 598, protected it from competition unless the competitor obtained a certificate from WMATC.

6. Orders and Opinion Below

In an extensive opinion dismissing the complaints, the District Court found that the interpretive service contracted for by the Secretary was to be conducted within an enclave over which the Secretary has exclusive jurisdiction and is therefore not transportation within the meaning of the WMATC Compact. Alternatively, the District Court held that even if WMATC had jurisdiction over services to be performed in the central Mall area, the services to be performed by Universal were "transportation by the Federal Government" and therefore expressly exempt from the provisions of the Compact. The District Court also found that the proposed interpretive tour service did not violate the protection accorded to D. C. Transit in its Franchise.

In reversing the District Court, the Court of Appeals did not hand down an opinion. Its order merely recited the conclusion that,

> "The various relevant statutory provisions, construed in relation one to the other, especially in

view of the physical location of the Mall in the Metropolitan area of the District of Columbia, do not afford authority to the appellee Universal Interpretive Shuttle Corporation validly to engage in such transportation for hire in the Mall area as is contemplated by the [Contract] . . . without a certificate of public convenience and necessity issued by the Washington Metropolitan Area Transit Commission authorizing such transportation. . . ." (App. 113-114).

SUMMARY OF ARGUMENT

I.

The Secretary of the Interior has exclusive jurisdiction over the National Park lands known as the Mall area in the city of Washington. D. C. Code §§ 8-108, 8-144; 16 U.S.C. §§ 1-3. The decision of the Secretary to provide a visitor interpretive service on the Mall pursuant to a contract with petitioner is clearly within the authority vested in the Secretary by Congress. 16 U.S.C. §§ 1-3, 17b, 20a-g. No provision of the interstate compact creating WMATC or the consent of Congress to the Compact purports to cede any portion of the Secretary's exclusive jurisdiction over the National Parks in the District of Columbia to WMATC. Settled rules of statutory construction and the legislative history of the Compact foreclose any argument that a cession of jurisdiction from the Secretary to WMATC can be implied from the terms of the Compact. All aspects of the service to be operated by petitioner are subject to stringent regulation by the Secretary. WMATC seeks to regulate the same aspects of petitioner's operations regulated by the Secretary under the terms of the Contract and applicable statutes. 16 U.S.C. §§ 17b, 20a-g. WMATC's attempted regula-

tion would frustrate expressed Federal policy and therefore is prohibited. *Leslie Miller, Inc.* v. *Arkansas*, 352 U.S. 187 (1956).

II.

The service to be provided in the Mall by petitioner pursuant to its Contract with the Secretary is not transportation within the meaning of the Compact. The Compact was enacted to effectuate joint control and regulation of mass transportation or commuter service within the Washington metropolitan area in a single body. The mobile interpretive service to be provided by Universal is not to be a part of the mass transit system of the Washington metropolitan area. It is the means by which visitors to Washington will be provided with a meaningful interpretation of the central Mall area.

Furthermore, the primary service to be offered by Universal—a service originating and terminating at the same point—does not fall within the jurisdictional requirement of the Compact that there be transportation "between any points."

III.

Even if it be assumed that the visitor interpretive service proposed by the Secretary is "transportation" within the meaning of the Compact, the proposed service is "transportation by the Federal Government" and thus exempt from regulation by WMATC. *Yearsley* v. *W. A. Ross Construction Co.*, 309 U.S. 18 (1940).

IV.

The proposed visitor interpretive service is not mass transit of passengers for hire by a bus line operating

over a given route on a fixed schedule. Therefore, the limited protection against competition accorded to D.C. Transit System in its Franchise is inapplicable in these premises.

V.

D.C. Transit System and the other intervenors who operate sightseeing tours within the Mall only at the sufferance of the Secretary have no standing to seek an injunction against the initiation of the visitor interpretive service by the Secretary.

ARGUMENT

Introduction

The District of Columbia is the Nation's Capital. This is the reason for its existence; this is the reason for its uniqueness. The great Mall in the City of Washington is the most important of the major parks in the District. It encompasses many major shrines of our national heritage, including the White House, the Ellipse, the Memorials to Washington, Lincoln and Jefferson which are the unique and priceless possessions of all the citizens of the United States. In reaching the necessary accommodation between the interests of the local population and the interests of the Nation as a whole, Congress has traditionally vested direct plenary authority over the national parks in the District, and the Mall in particular, in the executive branch of the Federal Government. In this case, the Court of Appeals has subjected the decision of the National Government to provide a new and meaningful service on the Mall to the oversight of an agency representing parochial interests. The very existence of such a power in a local agency threatens to hobble the National Gov-

ernment's ability to plan effectively for the preservation and enhancement of the Mall. Reversal of the Court of Appeals decision is necessary in order to preserve the thoughtful accommodation that Congress has expressed between the national and local interests.

I.

CONGRESS HAS VESTED EXCLUSIVE JURISDICTION IN THE SECRETARY OF THE INTERIOR OVER ACTIVITIES WITHIN THE CENTRAL MALL AND THE AUTHORITY CONFERRED INCLUDES THE POWER TO CONDUCT THROUGH A PRIVATE CONCESSIONER A MOBILE INTERPRETIVE SERVICE WITHIN THE CENTRAL MALL AND TO REGULATE SUCH SERVICE WITHOUT INTERFERENCE BY ANY LOCAL REGULATORY AGENCY.

A. Congress Has Specifically Conferred "Exclusive Charge and Control" Over the Mall of the District of Columbia on the National Park Service of the Department of the Interior.

The Court of Appeals decision studiously ignores a long history of Congressional mandates which vest exclusive control over the parks of the District of Columbia in the National Government. In the Act of July 1, 1898, 30 Stat. 570 as amended, D. C. Code § 8-108, Congress specifically provided that:

> "The park system of the District of Columbia is placed under the *exclusive charge and control of the Director of the National Park Service,* under such regulations as may be prescribed by the President of the United States." (Emphasis supplied).[3]

[3] In the aforementioned Act of 1898, Congress vested jurisdiction in the Chief of the Corps of Engineers of the United States Army. Such jurisdiction was transferred to the Director of Public Buildings and Public Parks of the National Capital by Act of February 26, 1925, 43 Stat. 983, and ultimately to the Director of National Park Service by Executive Order No. 6166, § 3, June 10, 1933.

This grant of authority is clear and unequivocal. This grant of exclusive charge and control was extended by the Act of March 4, 1909, 35 Stat. 994 as amended, D. C. Code § 8-144, which states:

> "The application of the rules and regulations prescribed prior to March 4, 1909, or that may be thereafter prescribed by the Director of the National Park Service, under the authority granted by sections 5-204, 8-108, 8-110, 8-127, 8-135 and 8-143, for the Government and proper care of all public grounds placed by that act under the charge and control of the said Director of the National Park Service, is hereby extended to cover the sidewalks around the public grounds and the carriageways of such streets as lie between and separate the said public grounds."

Still other provisions of the D. C. Code affirm the jurisdiction and define the duties of the Director of the Park Service with respect to National Parks located in the District of Columbia. See D. C. Code §§ 7-1208, 7-1209, 8-109, 8-115, 8-135, and 8-153. Thus, when the lands now comprising the West Potomac Park area, including the Tidal Basin and the Jefferson Memorial, were reclaimed and added to the Mall area, the Congress again conferred exclusive jurisdiction. The Act of August 1, 1914, 38 Stat. 634 as amended, D. C. Code § 8-154 provides that: "The Potomac Park is made a part of the park system of the District of Columbia under the *exclusive charge and control of the Director of the National Park Service* . . . ." (Emphasis supplied).

Congress has repeatedly reaffirmed its mandate that the Director of the Park Service has exclusive jurisdiction within the National Parks. In passing a comprehensive traffic ordinance for the District of Columbia in 1925 Congress was again careful to preserve exclu-

sive charge and control of the Director of the National Park Service. D. C. Code § 40-613 states that: "Nothing contained in this chapter shall be construed to interfere with *the exclusive charge and control* prior to March 3, 1925, *committed to the Director of the National Park Service over the park system of the District,* and he is hereby authorized and empowered to make and enforce all regulations for the control of vehicles and traffic, and limiting the speed thereof on roads, highways, and bridges within the public grounds in the District, under his control . . . ." (Emphasis supplied).

Congress could not have been more explicit in expressing its determination that the Director of the National Park Service has exclusive jurisdiction over all activities within the Mall area.

B. The General Regulatory Authority Vested by Congress in the Secretary of the Interior Pursuant to Powers Granted Congress in the Constitution Precludes Assertion of Jurisdiction by WMATC.

National parks and monuments occupy a special place in the statutory scheme for disposition and control of lands owned by the United States. By Act of August 25, 1916, 39 Stat. 535, 16 U.S.C. § 1, Congress created in the Department of the Interior a service called the National Park Service. The Service was charged specifically with the duty of promoting and regulating the use of the Federal areas known as national parks, monuments and reservations by such means and measures to conform to the fundamental purpose of national parks and reservations, which is to conserve the natural and historical objects and to provide for the enjoyment of same by such manner and

such means as will leave them unimpaired for the enjoyment of future generations. 16 U.S.C. § 1.

The same Act provides that the Director of the National Park Service "shall, under the direction of the Secretary of the Interior, *have the supervision, management, and control of the several national parks and national monuments* . . . ." 16 U.S.C. § 2. (Emphasis supplied). Congress also specifically granted to the Secretary the authority to exercise full regulatory control over national parks and monuments. The Act specifically provides that "The Secretary of the Interior shall make and publish such rules and regulations as he may deem necessary and proper for the use and management of the parks, monuments, and reservations under the jurisdiction of the National Park Service . . . ." 16 U.S.C. § 3. Acting pursuant to the foregoing statutory authority the Secretary of the Interior may make determinations with respect to the use and enjoyment of the national parks and national monuments which lie within the reservation known as the Mall area in the City of Washington.

Here the Secretary has determined that the number of visitors to the Mall area exceeded 12 million in 1965 and is expected to increase progressively in the coming years (App. 68). The Secretary also determined that the visitor demands require the provision of an expert interpretive service in order to promote full usage and enjoyment of the Mall area by the people of the United States (App. 68). These determinations are clearly within the power of the Secretary. 16 U.S.C. §§ 1-3. The Secretary also found that the United States has not provided the necessary facilities and services and determined that Universal as a concessioner should establish and operate the necessary facilities and services in

the Mall area at reasonable rates under the supervision and regulation of the Secretary (App. 68). Congress has clearly granted the power to the Secretary to provide necessary services and facilities in this manner. The Act of May 26, 1930, 46 Stat. 382, 16 U.S.C. § 17b, specifically provides that *"the Secretary of the Interior is hereby authorized to contract for services* or other accommodations provided in the national parks and national monuments for the public under contract with the Department of the Interior, as may be required in the administration of the National Park Service, *at rates approved by him for the furnishing of such services or accommodations to the Government. . . ."* (Emphasis supplied).

In the Act of October 9, 1965, 79 Stat. 969, 16 U.S.C. § 20, Congress re-examined the authority of the Secretary of the Interior to administer National Park System areas. It specifically found that the "preservation of park values requires that such public accommodations, facilities, and services as have to be provided within those areas should be provided only under carefully controlled safeguards against unregulated and indiscriminate use. . . . It is the policy of the Congress that such development shall be limited to those that are necessary and appropriate for public use and enjoyment of the national park area in which they are located and that are consistent to the highest practicable degree with the preservation and conservation of the areas." 16 U.S.C. § 20.

In the same Act, Congress specifically authorized the Secretary to make contracts such as the one in issue here. "Subject to the findings and policy stated in section 20 of this title, the Secretary of the Interior shall take such action as may be appropriate to encourage

and enable private persons and corporations (hereinafter referred to as 'concessioners') to provide and operate facilities and services which he deems desirable for the accomodation of visitors in areas administered by the National Park Service." 16 U.S.C. § 20a. The 1965 Act then provides specific standards for awarding of contracts by the Secretary to concessioners and regulation of the activities of concessioners. 16 U.S.C. § 20b-g.

The statutory plan enacted by Congress to delegate exclusive jurisdiction over the use and enjoyment of national parks is clearly within the power of Congress. Article IV, § 3, clause 2 of the Constitution authorizes Congress to "dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States. . . ." In *Dow* v. *Ickes,* 123 F. 2d 909, 914 (D. C. Cir. 1941), *cert. denied* 315 U. S. 807 (1942), the Court of Appeals construed a grant of power to the Secretary and in upholding the Secretary's power stated that "broader discretion hardly could have been conferred." The Court further noted that it could not interfere with the Secretary's exercise of his broad powers and discretion. *Ibid.* This power includes the power to construct roads and facilities and to determine the manner in which they shall be used and who shall use them. *United States* v. *Gray Line Water Tours of Charleston,* 311 F. 2d 779, 781 (4th Cir. 1962); *Robbins* v. *United States,* 284 Fed. 39 (8th Cir. 1922); *King* v. *Edward Hines Lumber Co.,* 68 F. Supp. 1019, 1022 (D. Ore. 1946). *Cf., Dow* v. *Ickes,* 123 F. 2d 909 (D.C. Cir. 1941).

The services required in the Contract between the United States and petitioner will be carried out on land

owned by the United States and exclusively controlled by the United States. It is noted in *United States* v. *Fraser*, 156 F. Supp. 144 (D. Mont. 1957), aff'd 261 F. 2d 282 (9th Cir. 1958),

> "It is well settled (1) that the United States can prohibit absolutely or fix terms on which its property may be used; (2) that Congress has the exclusive right to control and dispose of the public lands of the United States; and (3) that when that right has been exercised with reference to lands within the borders of a State, neither the state nor any of its agencies has any power to interefere. . . .
>
> "The power of Congress to control public lands may be exercised through vesting in the Secretary of the Interior the right to make rules and regulations necessary to effectuate the legislative policy. Regulations of the type here under consideration have long been held a valid exercise of delegated power." 156 F. Supp. at 147-148.

The specific activities required by the Contract between the United States and Universal will take place within the central Mall area of the city of Washington. Congress has specifically stated that the Director of the National Park Service of the Department of the Interior shall have "exclusive charge and control" of this area "under such regulations as may be prescribed by the President of the United States." D. C. Code § 8-108. Congress also has specifically authorized the Director of the National Park Service to regulate sidewalks and streets lying between and separating park areas on the Mall. D. C. Code § 8-144. This is a specific grant of authority to the Director of the National Park Service to regulate streets which bisect park lands but are otherwise under the jurisdiction of the District of Columbia. In addition, Congress has

enacted a comprehensive grant of regulatory authority to the Secretary which governs the very matters sought to be regulated by WMATC. 16 U.S.C. §§ 1-3, 17b, 20. In these premises the principles enunciated in *Fraser* apply, and WMATC has no authority to inject itself into the regulatory program vested by Congress in the Secretary.

C. Congress, in Consenting to the Interstate Compact Creating WMATC, Did Not Limit or Impair the Exclusive Jurisdiction of the Secretary Over the Mall.

WMATC was created by an interstate compact between the States of Maryland and Virginia and the District of Columbia. The essential purpose of the Compact was to centralize regulation of mass transportation in the Washington metropolitan area that had previously been fragmented among the Public Utilities Commission of the District of Columbia (PUC), Public Service Commission of Maryland, the Corporation Commission of Virginia and the Interstate Commerce Commission (ICC). Prior to the Compact, none of these agencies had jurisdiction within the park areas of the District of Columbia. Indeed, Congress has expressly prohibited both the District of Columbia PUC and the ICC from exercising regulatory authority within park lands of the District. The District of Columbia Traffic Act of 1925, 43 Stat. 1119, as amended by the Act, February 27, 1931, 46 Stat. 1424, by which the PUC was granted regulatory powers over routing and scheduling in the District of Columbia specifically provides:

> "Nothing contained in this Act shall be construed to interfere with the exclusive charge and control heretofore committed to the Chief of Engineers over the park system of the District. . . ."

The Interstate Commerce Commission Act, Act of August 9, 1935, 49 Stat. 544, as amended, 49 U.S.C. § 309(a) specifically provides:

> "That nothing in this chapter shall be construed to repeal, amend, or otherwise modify any Act or Acts relating to national parks and national monuments under the administrative jurisdiction of the Secretary of the Interior. . . ."

In addition, 49 U.S.C. § 303(b)(4) also exempts from ICC regulation "motor vehicles operated, under authorization, regulation, and control of the Secretary of the Interior, principally for the purpose of transporting persons in and about the national parks and national monuments. . . ."

These specific exemptions when read together with the provisions of D. C. Code §§ 8-108 and 8-144 which vested sole charge and control over the park areas within the District of Columbia in the Secretary conclusively demonstrate that prior to the Compact the Secretary's jurisdiction over transportation in the park areas of the District of Columbia was exclusive and impregnable.

Respondents have contended in the courts below that the PUC regulated bus lines and taxis which utilize park roads or streets bisecting parks in the course of their operations in the District of Columbia, and, therefore, that a service being provided entirely within the central Mall area for the Secretary is subject to regulation by the successor to PUC's regulatory authority, WMATC. This contention, however, ignores the vital fact that such regulation of buses and taxis has always been incidental oversight of certified or licensed carriers whose principal operations were subject to the regulatory authority of PUC and the successor to its regulatory authority, WMATC. The situation is

entirely different with respect to an enterprise seeking to conduct an activity entirely within park land under specific regulation by the Secretary because there is no portion of the operation outside of park lands subject to regulation by the WMATC to provide WMATC with a geographical basis for its assertion of jurisdiction which was present in the situations cited by it.

Moreover, bus lines and taxis whose routes and operations extend to all areas of the District under the authorization and regulation of WMATC and PUC are not likely to present and have not presented a jurisdictional challenge to regulation of their activity on park land by WMATC or PUC for the practical reason that all of their operations outside of park lands are, in any event, subject to regulation by these bodies. The mere fact that the Secretary has acquisced in such incidental acts by PUC and WMATC in no way infringes upon the Secretary's exclusive jurisdiction over the parks of the District of Columbia. Acquiescence does not mean abdication, and when the United States chooses to limit or terminate its acquiescence it may do so.[4] See *United States* v. *Unzeuta*, 281 U.S. 138, 144 (1930); *Petersen* v. *United States*, 191 F. 2d 154 (9th Cir. 1951). Cf. *Paul* v. *United States*, 371 U.S. 245 (1963). One who possesses exclusive power to regulate may choose to use it alone, or may choose, in the exercise of that regulatory power, to permit others to regulate by sufferance. The Secretary may later oust those who so act by sufferance from his jurisdictional enclave. Here, the Secretary has de-

[4] Cases in which the federal preemption doctrine is applied offer examples of how the Federal Government does not abdicate its regulatory powers by acquiescing in regulation by other bodies. Whenever it chooses to do so, the Federal Government may simply terminate the local regulatory scheme. See, *e.g.*, *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218 (1947); *Cloverleaf Butter Co.* v. *Patterson*, 315 U.S. 148 (1942).

termined that to fulfill his statutory duties he alone must regulate his concessioner's unique activities within the Central Mall. To this end, the Secretary has provided for detailed regulation of Universal's day-to-day activities.

In statute after statute, Congress has repeatedly emphasized its determination to vest exclusive control over the Mall in the Secretary. It is a fundamental principle of statutory construction that a legislature by enacting a statute does not intend to alter existing law beyond what it explicitly declares either expressly or by necessary implication. *Rath* v. *Eagle-Picher Co.*, 225 F. 2d 572 (10th Cir. 1955). There is also a presumption against interpretation of powers that infringe upon those of coordinate departments of government. *United States* v. *Klein*, 13 Wall. 128, 146-147 (1872). In this case there clearly is no necessary, or even reasonable, implication that Congress in consenting to the WMATC Compact intended to suspend the laws vesting exclusive jurisdiction over national parks in the Secretary.

Congress, in consenting to the Compact, did not confer any new, affirmative regulatory powers upon WMATC over park lands. Neither the Compact nor the enabling legislation contain any express provision granting such power. Indeed, with the notable exception of regulation of rates of interstate taxicabs (which exception is reflected by an express provision in the Compact), the Congress did not confer any powers upon WMATC not possessed by its predecessors. The legislative history demonstrates that Congress carefully limited the grant of power in the Compact to pre-existing power over transportation:

"*House Debate*

Rep. Lindsay: House Joint Resolution 402 deals with an important aspect of that problem, namely,

the centralization in a single agency of government of the regulatory jurisdiction over the several privately owned and operated transit companies presently serving the metropolitan area, which is now diffused among four separate States and Federal commissions.' 106 Cong. Rec. 11736 (1960).

* * * *

House Hearings

Charles R. Fenwick, Virginia State Senator: 'Actually the intent of this [the Compact] was simply to substitute the powers that are now enjoyed by four different agencies and put them into one.'

Rep. Tuck: '* * * The whole idea of this proposed compact is not to take away any powers from anybody?'

Fenwick: 'That is correct.'

Tuck: 'Not to confer upon the new regulatory body any powers not already now existing in other regulatory bodies? The purpose is simply to converge or consolidate them all into one body so there will be one responsible body to control and regulate the entire transportation system, with some exceptions, within the metropolitan area?'

Fenwick: 'That is correct; with no intent for this to affect labor in any way, or to create any new rights.'

Hearings on H.J.R. 402 Before a Subcomm. of the House Comm. on Jud., 86th Cong., 2d Sess., Pt. 1, p. 104-05 (1960) (hereinafter cited as Hearings).

Edward S. Northrop, Maryland State Senate: '* * * What this interstate commission will do is to merely to replace these four bodies, and nothing more.

'They have no more powers than the bodies had, than the Public Service Commission of Maryland

> or the Public Utilities Commission of the District of Columbia or the Corporation Commission of Virginia or the ICC in this particular area.'
>
> Hearings, Pt. 1, p. 118.
>
> Jerome M. Alper, attorney: 'In net effect, the compact centralizes to a great degree in a single agency, the Compact Transit Commission, the regulatory powers over private transit now shared by four regulatory agencies."
>
> Hearings, Pt. 2, p. 248.

W. E. Finley, Director of the National Capital Planning Commission, in a letter to Congress recommending that the Compact be enacted wrote:

> "The compact also fully details the extent of the regulatory authority of the Commission. It specifies the conditions under which the compact shall come into being and appropriately relates the functions of the Commission created by the compact to those presently exercised by the Public Utilities Commission of the District of Columbia, the Interstate Commerce Commission, the Public Utilities Commission of Maryland, and the State Corporation Commission of Virginia." H.R. Rep. No. 1621, 86th Cong. 2d Sess. 36 (1960) (hereinafter cited as H. Rep. No. 1621).

Giving due weight to settled principles of statutory construction and to the relevant legislative history, no cession of the Secretary's authority over park lands established in a host of Congressional enactments can be inferred from the consent of Congress to Article XII of the Compact which grants authority to regulate "transportation for hire between any points in the Metropolitan District. . . ." D. C. Code § 1-1410.

Nor did the suspension of laws provision in the Compact and the consent legislation make any inroads into

the exclusive jurisdiction of the Secretary over national parks in the District.

Article VIII of the Compact provides that the Compact becomes effective upon enactment by Congress of legislation suspending:

> "the applicability of the Interstate Commerce Act, the laws of the District of Columbia, and any other laws of the United States, to the persons, companies and activities which are subject to this Act, to the extent that such laws are inconsistent with, or in duplication of, the jurisdiction of the Commission or any provision of this Act. . . ." D. C. Code § 1-1410.

Article XII, § 20(a), also provides for suspension of the laws of the signatories to the Compact relating to transportation.

> "Upon the date this Act becomes effective, the applicability of all laws of the signatories, relating to or affecting transportation subject to this Act and to persons engaged therein, and all rules, regulations and orders promulgated or issued thereunder, shall except to the extent in this Act specified, be suspended. . . ." *Ibid.*

To implement the above provisions of the Compact, Congress enacted a statute suspending the applicability of:

> "the laws of the United States, and the rules, regulations, and orders promulgated thereunder, relating to or affecting transportation under the compact and to the persons engaged therein, including those provisions of section 40-603(e), relating to the powers of the Public Service Commission of the District of Columbia and the Joint Board created under such section. . . ." D. C. Code § 1-1412.

The purpose of the suspension of laws provision was to remove from the PUC and the ICC those regulatory powers which they possessed which were inconsistent with or duplicative of the provisions of the Compact.

In approving the Compact, Congress was very aware of the laws to be suspended and the Joint Congressional Committee considering the Compact set out in chart form the existing federal laws that were to be suspended in whole or in part by the Compact. H. Rep. No. 1621, pp. 29-30.[5] The statutes listed therein include parts of 49 U.S. Code and parts of Titles 40, 43, and 44 of the D. C. Code. *Ibid.* Totally absent from this chart is reference to any suspension or limitation of those statutes providing that the District of Columbia park areas are within the exclusive jurisdiction of the Secretary of the Interior. Thus, the contention that the enactment of the Compact impaired or limited the exclusive jurisdiction of the Director of the National Park Service over park areas within the District of Columbia must be rejected.

The suspension of laws provision did not create any new power in WMATC, it merely effected the transfer to WMATC of the regulatory powers then exercised by the ICC and the PUC. As was noted previously, neither the ICC nor the PUC had jurisdiction over national parks and, therefore, the body succeeding to their power, WMATC, can have no such jurisdiction unless such jurisdiction has been expressly conferred upon it. WMATC, however, has argued that the suspension of laws not only effected the transfer to it of the regulatory power of the PUC and the ICC but also suspended the exemptions in the ICC Act, 49 U.S.C. §§ 309(a); 303(b)(4). Again WMATC ignores

[5] The chart is set forth in Appendix B of this brief.

the legislative history of the Compact wherein, in considering the laws to be suspended, Congress sets forth:

> "a listing of the Federal laws *which are suspended in whole or in part to the extent that such laws are inconsistent with or in duplication of the provisions of the Compact. . . .*" (Emphasis supplied) H. Rep. No. 1621, p. 29.

It is significant that it is only the provisions of the ICC and PUC Acts which conferred upon these bodies the power to regulate passenger transportation for hire that are inconsistent with or duplicative of the Compact. No other provisions of these Acts therefore are suspended. The exemption provisions of 49 U.S.C. §§ 309(a), 303(b), are neither "inconsistent with or duplicative of" any provisions of the Compact. Consequently, these exemption provisions were not affected in any manner by the suspension of laws provision.

In the court below respondents argued that an intent to limit the Secretary's power can be inferred from Congressional silence regarding an explanatory amendment offered by the Secretary to a proviso of the suspension of laws section of the Congressional consent to the Compact. The proviso as enacted reads:

> "That nothing in this subchapter or in the compact shall affect the normal and ordinary police powers of the signatories and of the political subdivisions thereof and of the *Director of the National Park Service* with respect to the regulation of vehicles, control of traffic and use of streets, highways, and other vehicular facilities. . . ." D. C. Code § 1-1412 (Emphasis supplied).

When the Compact was being considered by Congress the Secretary recommended its adoption but suggested

some technical amendments. One of these amendments was directed at deleting "Director of the National Park Service" from the above-quoted proviso and adding a specific proviso relating to the Park Service. The Secretary offered such an amendment because he believed that "police powers" was not a term descriptive of the authority and responsibilities of the Director of the Park Service. H. Rep. No. 1621, p. 49. He suggested the following proviso:

> "That nothing in this Act or in the compact shall affect the authority and responsibility of the Secretary of the Interior pursuant to section 3 of the Act of August 25, 1916 (39 Stat. 535), as amended, and other Acts of Congress controlling the development and use of national parks, monuments, and reservations comprising the National Park System." *Ibid.*

This amendment was not adopted by Congress and no reference to it was made in any of the hearings, committee reports or Congressional debates.

Reliance by respondents on Congressional silence regarding the Secretary's amendment is entirely misplaced because silence is at least equally consistent with the conclusion that Congress believed the amendment was unnecessary. *United States* v. *United Mine Workers,* 330 U.S. 258, 277 (1947). Moreover, the latter supposition is even more probable in this case because Congress, in consenting to the Compact and supporting statute, specifically focused on those laws it intended to suspend or abrogate and the power and jurisdiction of the National Park Service was not included therein. Under these circumstances, it would be unreasonable and irrational to construe the silent refusal to adopt an amendment specifically preserving

the powers and jurisdiction of the Director as an adoption of a law severely circumscribing his exclusive jurisdiction over the Mall area. *United States* v. *California,* 332 U.S. 19 (1947).

Furthermore, there is no reason why the term "police powers" should not be interpreted as including the full scope of the preexisting authority delegated by Congress to an executive agency to make rules and regulations relating to property of the United States at least insofar as such authority relates to the operation of vehicles. As the court said in *Tennessee* v. *United States,* 256 F. 2d 244, 258 (6th Cir. 1958):

> "Since Congress has the power to 'make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States' (Constitution, art. 4, § 3, cl. 2), this power of the United States, analogous to the police power of a state, is clearly applicable where the lands of the United States are concerned."

See also *Robbins* v. *United States,* 284 Fed. 39, 45 (8th Cir. 1922). Since the Secretary had the authority, prior to the enactment of the Compact, to authorize without the approval of the PUC or the ICC, a service involving vehicles of the type provided for under the Contract, the police power reservation in the Compact has expressly preserved that authority.

D. WMATC's Claim of Jurisdiction Over the Mall Area Would Create Irreconcilable Conflicts With the Regulatory Scheme Approved by Congress in the Act of October 9, 1965.

Congress assented to the Compact which created WMATC in 1960 and assented to amendments in 1962. Thereafter, Congress again had occasion to re-examine the authority of the Secretary to regulate concessioners in national parks such as the Mall. Congress specifi-

cally reaffirmed the pre-existing jurisdiction, policies and regulatory activities of the Secretary.

In the Act of October 9, 1965, 79 Stat. 969, 16 U.S.C. § 20,. Congress enacted a comprehensive regulatory scheme concerning concessions for accommodations, facilities and services in areas administered by the National Park Service. Section 20 is a statement of Congressional findings and a statement of purpose. Section 20a specifically grants authority to the Secretary of the Interior to establish policies and to contract with concessioners to provide and operate facilities which *he* deems desirable in areas administered by the National Park Service. Section 20b contains specific provisions with respect to the protection of concessioners' investments, return of capital, determination of reasonableness of concessioners' rates and source and determination of franchise fees. Section 20c governs the grant of preferential rights such as the one granted to Universal in its contract with the Secretary. Section 20d makes provisions for renewals. Section 20g provides for the authority of the Secretary to prescribe the manner in which to keep records and also prescribes periodic audit of such books and records by the Secretary and by the Comptroller General of the United States.

In the exercise of this authority the Secretary has provided for a comprehensive program of regulations in the contract with Universal for the regulation of the activities of Universal. This program of regulations includes, among other things, the type and number of mobile units to be utilized, rates, routes, hours of service, scheduled trips, accounting systems, insurance and bonds (App. 72-87). These are the very matters which WMATC would purport to regulate if the Secretary and Universal would accede to its juris-

diction. Compare Compact, Article XII, §§ 4-7, 9 and 10. WMATC's attempt to foist its jurisdiction on the Secretary would, if sanctioned by the Court, create an intolerable conflict with federal policy and the federal regulatory scheme vested in the Secretary by the Act of October 9, 1965, 79 Stat. 969-971, 16 U.S.C. § 20a-g.

WMATC is essentially a creature of two States and a municipal corporation. Congress, by giving its consent to the Compact pursuant to Article I, § 10, Clause 3 of the United States Constitution, is performing a duty required of it in order to protect against infringement of the federal government's jurisdiction. *Virginia* v. *Tennessee,* 148 U.S. 503 (1893). Such Congressional consent, however, essentially is an approval of the terms agreed to by the participant states rather than affirmative legislation. *Henderson* v. *Delaware River Joint Toll Bridge Commission,* 66 A. 2d 843 (Pa. 1949); *People* v. *Central R. R.,* 79 U.S. 455 (1872).

The instant Compact deals with mass transit in the metropolitan area of Washington, a matter of great concern to the 2,500,000 inhabitants of the District of Columbia and suburban Maryland and Virginia. On the other hand, the Mall is a shrine for the Nation's 200,000,000 people. Congress has committed the responsibility for all aspects of its care and utilization to an official of the National government, the Secretary of the Interior. If a conflict between local interest and National interest should arise in this context the National interest must prevail.

The courts have held in a variety of contexts that local regulatory schemes cannot be applied to activities of a private contractor performed pursuant to a contract with the United States awarded in conformity

with federal law. Thus, in *Leslie Miller, Inc.* v. *Arkansas*, 352 U.S. 187 (1956), a contractor received an award for the construction of federal facilities in the State of Arkansas. The contractor began work and subsequently was convicted for working as a contractor within that State without a license as required by State law. The Supreme Court reversed the conviction, *per curiam*, reasoning that to subject the contractor to Arkansas licensing requirements would frustrate the federal policy, expressed in the Armed Services Procurement Act, for awarding bids for federal projects to the lowest responsible bidder. The Supreme Court said:

> "Mere enumeration of the similar grounds for licensing under the state statute and for finding 'responsibility' under the federal statute and regulations is sufficient to indicate conflict between this license requirement which Arkansas places on a federal contractor and the action which Congress and the Department of Defense have taken to insure the reliability of persons and companies contracting with the Federal Government. Subjecting a federal contractor to the Arkansas contractor license requirements would give the State's licensing board a virtual power of review over the federal determination of 'responsibility' and would thus frustrate the expressed federal policy of selecting the lowest responsible bidder." 352 U.S. 187, at 189-190. Accord: *United States* v. *City of Chester*, 144 F. 2d 415 (3rd Cir. 1944). See *James* v. *Dravo Contracting Co.*, 302 U.S. 134 (1937).

In the case at bar, Congress has established a comprehensive federal policy for the use and enjoyment of the national parks and national monuments. 16 U.S.C. § 1. Congress has vested full authority for execution of that authority in the Secretary. 16 U.S.C. § 1-3;

D. C. Code § 8-108. Congress has enacted a detailed procedure for the award of contracts to provide services and facilities in the national parks. 16 U.S.C. §§ 17b, 20a-g. The Secretary has followed that procedure in this instance. The Contract awarded to Universal provides a detailed scheme of regulation of the operations and activities by the Secretary (App. 72-87). The regulatory scheme established by the Secretary covers essentially the same matters sought to be regulated by WMATC. *Cf.*, Compact, Title II, Article XII, §§ 4-7, 9, 10. Thus, to permit WMATC to assert jurisdiction would create an irreconcilable conflict with regulatory power specifically vested in the Secretary by Congress.

II.

THE SERVICE TO BE PROVIDED BY PETITIONER TO THE UNITED STATES WITHIN A NATIONAL PARK ENCLAVE AS AN INCIDENT OF THE EDUCATIONAL CAMPAIGN OF THE SECRETARY IS NOT "TRANSPORTATION FOR HIRE BETWEEN POINTS" WITHIN THE MEANING OF THE COMPACT.

There is no dispute that trams will be utilized as an incident of the proposed visitor interpretive service. The disputed issue is whether the proposed service is transportation within the meaning of the Compact. The District Court correctly held that the proposed service is not "transportation" as that term is used in the Compact.

A. The Compact Is Concerned With Mass Transit, a Concept Which Differs Radically From the Concept of the Secretary's Interpretive Service.

The Compact is entitled "Compact For Mass Transportation" in the Act of September 15, 1960, 74 Stat. 1031, D. C. Code § 1-1410, and it was enacted to effectuate joint control and regulation of mass trans-

portation, or commuter service, within the Washington metropolitan area in a single body. The unique services Universal has agreed to provide visitors under the Contract with the Secretary are not commuter or mass transportation services. An examination of the reasons for the Compact indicates that it was not contemplated that services of the type to be provided by Universal would be subject to the Compact.

Prior to enactment of the Compact there was great concern by Virginia, Maryland and District of Columbia officials regarding the adequacy of commuter service and mass transit in the Washington metropolitan area. In early 1954 a joint commission of representatives from Maryland, Virginia and the District of Columbia was established to consider:

> "(1) the adequacy of present passenger carrier services in the Washington Metropolitan area, and (2) whether joint action . . . is necessary or desirable in connection with the regulation of passenger carrier facilities operation in such area." H. Rep. No. 1621, p. 4.

In 1955, the 84th Congress appropriated funds to enable the National Capital Planning Commission and the National Capital Regional Planning Council:

> "to jointly conduct a survey of the present and future mass transportation needs of the National Capital region. . . ." *Ibid.*

These studies revealed many problems in commuter service in the Washington metropolitan area and adoption of an interstate compact was recommended to alleviate these mass transit problems.

The joint commission negotiated an interstate compact which was adopted by Virginia in 1958 and by

Maryland in 1959. In 1960 Congress authorized negotiation of the Compact by the District of Columbia. Act of July 14, 1960, 74 Stat. 544, D. C. Code § 1-1408. Shortly thereafter Congress gave its consent to the Compact and also authorized the District of Columbia Commissioners to enter into the Compact. Act of September 15, 1960, 74 Stat. 1031, 1050, D. C. Code §§ 1-1410, 1411.

Clearly the purpose of the Compact was to resolve the many commuter and mass transit problems confronting the Washington metropolitan area. This purpose is emphasized by the Preamble to the Compact which states:

> "Whereas the regulation of *mass transit service* in the metropolitan area of Washington, District of Columbia, is divided among the public utility regulatory agencies of the States of Virginia, Maryland, and the District of Columbia and the Interstate Commerce Commission; and
>
> "Whereas such divided regulatory responsibility is not conducive to the *development of an adequate system of mass transit for the entire metropolitan area,* which is in fact a single integrated, urban community . . . ." (Emphasis supplied).

Thus, the Compact purports to deal with the problems of mass transit or commuter service in the Washington metropolitan area. This concern with commuter service and mass transportation is an entirely proper and legitimate concern of the parties to the Compact. The service to be provided by Universal under its Contract with the Secretary, however, is not a commuter service (App. 38, 41-42, 44, 75).

Thus, when the services Universal has agreed to provide are compared with the reasons for the Compact,

it is apparent that the word "transportation" as used in the Compact is not descriptive of Universal's services and not applicable thereto. The mobile interpretive service is not to be a commuter service; it is not to be a part of the mass transit system of the Washington metropolitan area. Rather, it is to be the means by which visitors to Washington will be provided with a meaningful interpretation of the National shrines in the Mall area (App. 108).

B. The Service to be Provided by Petitioner Is Not Transportation for Hire Between Points.

Article XII, Section 1(a) of the Compact only applies to "transportation for hire by any carrier of persons *between any points* . . . ." (Emphasis supplied). Section 2(a) of the Contract contemplates a

> "*visitor interpretive service originating and terminating at the same point,* with no passengers embarking or debarking en route, and such other types of service as may be approved by the Secretary . . . ." (Emphasis supplied).

Thus, the primary service to be offered by Universal does not fall within the jurisdictional requirement of the Compact, namely, that there be transportation "between any points." This very significant fact was apparently overlooked by the Court of Appeals which stated that Universal does not have authority "to engage in such transportation for hire in the Mall area as is contemplated by the contract" without obtaining a permit from WMATC.

III.

EVEN IF THE SERVICE TO BE PERFORMED BY PETITIONER FOR THE UNITED STATES IS "TRANSPORTATION" WITHIN THE MEANING OF THE COMPACT, SUCH "TRANSPORTATION" IS "TRANSPORTATION BY THE FEDERAL GOVERNMENT" AND THEREFORE EXEMPTED BY THE COMPACT FROM REGULATION BY WMATC.

Section 1(a)(2), Article XII of the Compact specifically excepts from the jurisdiction of WMATC "transportation by the Federal Government." WMATC has conceded that if the service being challenged were provided by vehicles operated by the Park Service, as it was in 1966 on a temporary basis, the operation would be exempt under the aforementioned section of the Compact; but WMATC contends that what the Government can do directly, it cannot do indirectly through its own concessioner. This contention is clearly erroneous.

Here, the Secretary has contracted with Universal for services to be performed on Federal land in the National Park System within his jurisdiction. 16 U.S.C. §§ 1-3, 20; D. C. Code § 8-108. Under the Contract Universal's day-to-day activities will be so intertwined with those of the Park Service as to be virtually indistinguishable; indeed, the trams will bear a Park Service emblem, Universal personnel will wear uniforms approved by the Park Service, and the United States will share directly in Universal's gross revenues from the service. In every meaningful sense, any interference by WMATC with Universal's activities under the Contract would constitute a direct interference with the Federal Government in the discharge of its management responsibilities over the National Parks. The contracting procedure utilized and the regulatory

scheme established in the provisions of the Contract were specifically authorized by Congress. 16 U.S.C. §§ 17b, 20a-g. When such conditions and circumstances are present ". . . the action of the agent is 'the act of the government'." *Yearsley* v. *W. A. Ross Construction Co.*, 309 U.S. 18, 22 (1940).

In *Yearsley*, plaintiff, a farmer, sued defendant, a government contractor for damages on the ground that defendant in the course of building dikes on the Missouri River had produced artificial erosion and had washed away a portion of plaintiff's land. Plaintiff had judgment in the District Court. The Court of Appeals reversed on the merits. The Supreme Court affirmed the judgment of the Court of Appeals, but relied upon a different rationale. The Supreme Court held that since the act of the contractor was an act of the United States the sole remedy of the plaintiff was an action against the United States in the Court of Claims. The Supreme Court held:

> ". . . The Court of Appeals also found it to be undisputed that the work which the contractor had done in the river bed was all authorized and directed by the Government of the United States for the purpose of improving the navigation of this navigable river. It was also conceded that the work thus authorized and directed by the governmental officers was performed pursuant to the Act of Congress of January 21, 1927, 44 Stat. at L. 1010, 1013, chap. 47.
>
> "In that view, it is clear that if this authority to carry out the project was validly conferred, that is, if what was done was within the constitutional power of Congress, there is no liability on the part of the contractor for executing its will."
> 309 U.S. at 20-21.

Here there can be no doubt that the service to be performed by Universal is authorized and directed by the Secretary pursuant to Acts of Congress, 16 U.S.C. §§ 1-3, 17b, 20; D. C. Code § 8-108, which are within the Constitutional power of Congress to enact. U.S. Constitution Article IV, § 3, cl. 2. *Dow* v. *Ickes,* 123 F. 2d 909, 913-914 (D. C. Cir.), *cert. denied* 315 U.S. 807 (1941). *United States* v. *Gray Line Water Tours of Charleston,* 311 F. 2d 779, 781 (4th Cir. 1962). Under these circumstances, the service to be provided by Universal is an activity of the Federal government and, accordingly, exempt from WMATC's jurisdiction by reason of Section 1(a)(2), Article XII of the Compact.

IV.

THE SERVICES TO BE PERFORMED BY PETITIONER DO NOT VIOLATE ANY PROTECTION GRANTED TO D.C. TRANSIT SYSTEM IN ITS FRANCHISE.

At each stage of this proceeding D. C. Transit has contended that the proposed interpretive service would violate the protection against competition provided in Section 3 of its Franchise, Act of July 24, 1956, 70 Stat. 598. The District Court rejected this contention, stating that

> ". . . it appears to the court that D. C. Transit is overreaching when it claims Section 3 protection against this shuttle service. In our opinion, what Congress intended to give the D. C. Transit was protection in the operation of its day to day activities in the mass movement of the public of Washington, D. C. over the D. C. streets. What the Secretary is proposing to do is in no wise competitive with that fundamental function of the D. C. Transit System.
>
> "Apparently the D. C. Transit does operate some fixed routes from time to time through the

Mall area for which it seeks specific permission from the Secretary of the Interior, thus recognizing his absolute control over operations within that area. Those are bus commuter services rather than sightseeing services and would hardly be deemed competitive with the shuttle service as envisioned by the contract with Universal." (App. 111).

Since the Court of Appeals held that Universal's service under the Contract is subject to the certification requirements of WMATC, it did not pass upon this issue raised by D. C. Transit.

In order fully to understand D. C. Transit's Franchise it is important to know the reasons for its enactment. In the summer of 1956 a protracted strike against Capital Transit Company caused severe hardship and inconvenience to local commuters and created chaotic traffic conditions. After due inquiry Congress revoked the franchise of Capital Transit Company and granted to D. C. Transit ". . . a franchise to operate a *mass transportation system of passengers for hire* . . . ." 70 Stat. 598 § 1(a) (Emphasis supplied).

Section 3 of the Franchise provides that "no competitive . . . bus line . . . for the transportation of passengers of the character which runs over a given route on a fixed schedule, shall be established . . . without the prior issuance of a certificate by [WMATC] to the effect that the competitive line is necessary for the convenience of the public." 70 Stat. 598 § 3.

Section 6 of the Franchise authorizes D. C. Transit "to engage in special charter or sightseeing services" subject to compliance with the applicable laws of the

District of Columbia and the States in which such operations take place and the Interstate Commerce Act. 70 Stat. 598 § 6.

D. C. Transit has contended (1) that the proposed mobile interpretive service (and indeed its own sightseeing activities) is mass transportation within the meaning of Section 1(a) of its Franchise; (2) that the protection afforded by Section 3 of its Franchise extends not only to Section 1(a) activities but also encompasses Section 6 activities; and (3) that the proposed interpretive service is a *competitive bus line* for the transportation of passengers for hire which runs over a *given route* on a *fixed schedule* within the meaning of Section 3, and that therefore the interpretive service proposed by the Secretary violates Section 3 of its Franchise. The facts of this case and the settled rules of statutory construction demonstrate the fallacy of each of these contentions.

First, as the District Court found, the interpretive service proposed by the Secretary clearly is not "mass transportation" within the meaning of D. C. Transit's Franchise (App. 111). The interpretive service is a unique means of interpreting the memorials within the Mall to visitors (App. 48), and will operate wholly within the Central Mall area. It is difficult to even conceive of a commuter accustomed to using D. C. Transit's regular route services who would choose instead to use a tram featuring live narration of national memorials proceeding around the Mall at a speed of "not more than 10 miles per hour" as transportation (Government & Deft's Ex. 3, p. 4, Tr. 67).

Second, assuming, *arguendo*, that the interpretive service to be provided by Universal is not unique,

nevertheless it can be equated only with D. C. Transit's existing sightseeing service which is not protected under Section 3 of its Franchise. The District Court concluded that the specific authorization of sightseeing service in Section 6 of the Franchise makes it abundantly clear that Congress did not intend to include sightseeing services within the limited protection against competition provided in Section 3 of D. C. Transit's "franchise to operate a mass transportation system of passengers for hire." If Congress had regarded the Section 1(a) grant of authority as including permission to operate sightseeing services, it certainly would not have been necessary for it to add Section 6 to the Franchise. D. C. Transit's contention requires the Court to assume that the grant of sightseeing authority in Section 6 is merely a redundant provision. Such an assumption would offend both the dictates of common sense and the rules of statutory construction, for it is well established that:

> "[A] statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." *In the Matter of the Public National Bank of New York* 278 U.S. 101, 104 (1928). See *Abbott* v. *Bralove,* 176 F. 2d 64 (D. C. Cir. 1949).

Thus, the existence of Section 6 compels the conclusion that Congress did not regard the term "mass transportation system" as including sightseeing services which may be similar to the service which the Secretary has proposed. And since the protective provisions of Section 3 apply only to services operated under authority of Section 1(a) of the Franchise, D. C. Transit cannot invoke Section 3 to prohibit the interpretive service proposed by the Secretary.

Finally, Section 3 of the Franchise affords no protection to D. C. Transit from the proposed interpretive service because the service is not a *competitive* bus line "which runs over a *given route* on a *fixed schedule.*" 70 Stat. 598 § 3. (Emphasis supplied).

The District Court after considering the testimony found as a fact that the service proposed by the United States is " . . . in no wise competitive . . . " with D. C. Transit's commuter service, and therefore is not within the protection against competition provided for in D. C. Transit's Franchise. (App. 111).

In addition, the settled administrative practice of WMATC demonstrates that sightseeing services have never been considered to be over a "given route" on a "fixed schedule" by WMATC or any of the intervenors prior to this action. These terms are descriptive only of the regular commuter services provided by D. C. Transit. The certificates held by all sightseeing operators, including D. C. Transit, designate such operations as "Irregular Routes" and "Special Operations." (See attachments to WMATC Ex. 3, especially D. C. Transit Certificate No. 5, p. 12, Tr. 12.) Counsel for intervenor Washington Sightseeing Tours, Inc., conceded that sightseeing operations are distinguishable from the regular route operations of D. C. Transit in that they do not run "over a given route on a fixed schedule." (Washington Sightseeing Tours Ex. 1, pp. 31-36, Tr. 15.) Yet all of the sightseeing services operate according to prearranged schedules, depart from fixed points and follow routes which are described in detail in their printed brochures (Washington Sightseeing Tours Ex. 2, 3, Tr. 15). Thus, D. C. Transit's contention that the proposed interpretive service operates over a "given route" on a "fixed schedule" within the

meaning of Section 3 of its Franchise flatly contradicts WMATC's settled practices and the sightseeing industry's long-established official position.

Moreover, under its Contract with the Secretary, Universal has no control over either the route or the schedule of the interpretive service. The Contract specifically provides:

> "The Secretary authorizes the Concessioner . . . to operate a Visitor Interpretive Shuttle Service . . . *along such routes as may be approved by the Secretary*. . . ." (App. 70-71). (Emphasis supplied).

The Contract further provides:

> "(*b*) *Schedule of Trips. Because the Secretary has a continuing responsibility in regard to the Mall area, and pedestrian and vehicular traffic thereon, the hours of operation and number of trips per hour shall be subject to regulation and approval of the Secretary.*" (App. 75). (Emphasis supplied).

Thus, the Secretary has complete discretion to change at any time both the route and the schedule.[6]

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[6] In support of its contention that Universal's proposed services come within the ambit of "fixed schedule" as that term appears in Section 3 of the Franchise, D. C. Transit has relied upon a portion of Section 6(a)(2) of the Contract. Section 6(a)(2) reads *in full* as follows:

> "Sufficient equipment shall be furnished to operate three trips per hour within four months after the effective date of this contract, and sufficient additional equipment to operate a minimum of twelve (12) trips per hour, within one year from such date. Such additional equipment as may be necessary to meet the increasing needs of visitors, as determined by the Secretary, shall be furnished." (App. 75).

This provision deals with minimum equipment requirements, *not* schedules.

The District Court aptly observed that:

> " . . . It is difficult to characterize the proposed operations of the shuttle service as proceeding over 'a given route' on a 'fixed schedule' when it is apparent from the contract with the defendant Universal that the Secretary has not designated a route, has not designated a schedule, and reserves the right to direct how the shuttle service shall be conducted at any given time." (App. 111).

V.

THOSE RESPONDENTS WHO NOW OPERATE SIGHTSEEING TOURS THROUGH THE MALL AT THE SUFFERANCE OF THE SECRETARY OF THE INTERIOR HAVE NO STANDING OR ANY SUBSTANTIVE RIGHT TO SEEK AN INJUNCTION OF PROHIBITING THE SERVICE PROPOSED BY THE SECRETARY.

The District Court correctly held that the respondents "who enjoy the right to operate their sightseeing services within the Mall area only at the sufferance of the Secretary . . . have no standing whatsoever" to petition the Court to enjoin the Secretary from engaging in similar operations on his own account (App. 112).

The Secretary has exclusive jurisdiction over the Mall area. D. C. Code §§ 8-108, 8-144; 16 U.S.C. §§ 1-3. The regulations of the National Park Service prohibit commercial solicitation in the Mall (App. 48). Uncontradicted testimony by the Director of the National Park Service and a legal adviser to the Secretary of the Interior establish that those companies which now conduct sightseeing tours on the Mall do so only at the sufferance of the Secretary (App. 42, 48). He could exclude them at any time if he saw fit. *U. S.* v. *Gray Line Water Tours of Charleston,* 311 F. 2d 779 (4th Cir. 1962). Therefore, respondents now operating

tours on the Mall have no standing or any substantive right to seek an injunction prohibiting the operation of the service proposed by the Secretary.

CONCLUSION

The order of the Court of Appeals should be reversed and the cases remanded with instructions to dismiss the complaints and to deny the petitions for an injunction and for declaratory relief.

Respectfully submitted,

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